**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| In the Matter of the Joint Application of Verizon Communication Inc. ("Verizon") and MCI, Inc. ("MCI") to Transfer Control of MCI's California Utility Subsidiaries to Verizon, which Will Occur Indirectly as a Result of Verizon's Acquisition of MCI. | Application 05-04-020 (Filed April 21, 2005) |

# ADMINISTRATIVE LAW JUDGE'S RULING GRANTING, IN PART, MOTION FOR PROTECTIVE ORDER

## 1. Summary

This ruling grants in part and denies in part the joint motion of Verizon Communications Inc. (Verizon) and MCI, Inc. (MCI) (collectively, the Applicants) for a protective order for what the Applicants deem highly confidential documents that they have disclosed to the Federal Communications Commission (FCC). The motion was filed on July 11, 2005. Responses were filed on July 14, 2005, by Qwest Communications Corporation (Qwest) and Covad Communications Company (Covad). Under this ruling, certain in-house counsel and in-house staff of competitive companies who are preparing testimony and evidence in this proceeding and who are not involved in marketing will have access to competitively sensitive information under strict conditions.

## 2. Applicants' Motion

Several parties have made requests for copies of all documents that Verizon and MCI produced to the FCC in connection with that agency's review

of Applicants' proposed merger. The FCC allowed inspection of the most confidential of these documents (called the Highly Confidential category) only after it imposed a strict new Second Protective Order.[1] The Second Protective Order limits availability of the Highly Confidential documents to outside counsel of record, their employees, and outside consultants and experts whom they retain to review the documents. Access is denied to in-house counsel and other employees of competitor companies. Under the FCC order, the protected data are:

> …the portions of the documents or data that disclose the identity or characteristics of specific customers or of those with whom a company is negotiating; that provide revenues and numbers of customers broken down by customer type and market area; that discuss in detail the Submitting Party's future plans to compete for specific groups of types of customers, including the Submitting Party's future procurement strategies, pricing strategies, product strategies, or marketing strategies; that provide detailed or granular engineering capacity information; that discuss in detail the number of anticipated changes in the number of customers or amount of traffic; that discuss in detail plans to construct new facilities; that discuss in specific detail or provide disaggregated quantification of merger integration benefits or efficiencies; and that have some of the characteristics of multiple categories. (FCC Second Protective Order, at 2 (parenthetical references deleted).)

[1] *See* Order Adopting Protective Order, *In re Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WE Docket No. 05-75 (March 10, 2005) ("First Protective Order') and Order Adopting Protective Order, WC Docket No. 05-75 (May 25, 2005) ("Second Protective Order"). Together, these orders establish "Confidential," "Highly Confidential" and "Copying Prohibited" categories of protection for all documents produced in the FCC proceeding.

According to the Applicants, the Second Protective Order was necessary because certain information requested by the FCC called for production of information far more sensitive than the Applicants had anticipated producing in state or federal proceedings. The Second Protective was issued after the Applicants' non-disclosure agreement (NDA) was entered into in this proceeding on April 21, 2005. The Applicants state that production of Highly Confidential material in this proceeding, as in the FCC proceeding, should occasion an increase in non-disclosure requirements.

The Utility Reform Network (TURN) was the first party in this proceeding to request copies of the Applicants' FCC production, and TURN agreed to abide by the confidentiality provisions in the FCC's First and Second Protective Orders as a condition of receiving the FCC material.[2] In addition, in order to speed production of the voluminous FCC document response, Applicants decided to forgo the time required to redact non-California-specific data and, on July 8, 2005, produced to TURN unredacted images of the entire FCC production.[3] This was done on an electronic database Verizon created for this proceeding.

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[2] As a non-commercial party, inside counsel for TURN are deemed to be "outside counsel" for purposes of the Second FCC Protective Order, provided that they are not involved in competitive decision-making activities for any competitor of Applicants.

[3] Verizon states that it has provided 8,883 documents comprising 200,000 pages to the FCC. The documents have been categorized as follows: 1,742 documents are Highly Confidential Copying Prohibited; 6,124 documents are Highly Confidential Copying Permitted; 274 documents are Confidential Copying Permitted; and 743 documents are Public Copying Permitted. MCI has produced some 700,000 pages to the FCC, with about 10 percent of them subject to a prohibition on copying.

Competitor parties to this proceeding – specifically Qwest and Covad – have filed "me too" data requests in which they seek all information that Applicants have provided to other parties, including the Highly Confidential data provided to TURN. However, Qwest and Covad refused to agree to the protective provisions of the FCC Second Protective Order. Applicants state that both Qwest and Covad have agreed to be bound by both protective orders at the FCC and have reviewed the Applicants' documents pursuant to those protections in the federal proceeding. According to Applicants, "(t)heir refusal to agree to identical protective treatment of the identical documents in this proceeding would provide their in-house legal and regulatory personnel with unnecessary and unwarranted access to highly proprietary and competitive sensitive information about the Applicants' business operations, which would create the risk of competitive harm." (Applicants' Joint Motion, at 2.)

The FCC's Second Protective Order prohibits competitors' in-house personnel from accessing Highly Confidential information because such access is not necessary for regulatory participation (because competitors can participate fully through outside counsel and experts), and because the effect of such access on the Applicants' business operations could be "devastating." (FCC Protective Order II ¶ 2.)

The Applicants acknowledge that Administrative Law Judge (ALJ) Pulsifer granted a motion to compel brought by Qwest as to a similar legal issue in the SBC-AT&T merger proceeding, Application 05-02-027. However, Applicants argue that the facts in this case warrant a different result, in particular because of Applicants' cooperative approach to discovery and competitor parties' indirect and last-minute requests concerning the voluminous FCC document production.

Accordingly, the Applicants ask that the Commission update the NDA pursuant to General Order 66-C to incorporate the federal protections governing FCC material.

### 3. Opposition to the Motion

Qwest and Covad filed comments in opposition to Applicants' motion. They argue that they have signed Applicants' NDA and that there is no valid reason for Applicants to prevent Qwest and Covad representatives access to FCC data available to others. They state that the evidence in this matter will be compromised if the Commission does not ensure that all parties have identical access to confidential data presented to the Commission on an identical basis. Otherwise, they state, some parties will have access to key pieces of evidence in presenting their testimony while other parties will not.

Qwest points out that the Applicants' NDA in this case already contains a "Lawyers Only" designation that limits access to highly sensitive materials to outside counsel and experts and to regulatory counsel, witnesses and regulatory employees who (a) have signed the NDA, (b) have a need to know the information for the purpose of case preparation in this proceeding, including any appeals, and (c) do not engage in developing, planning, marketing or selling products or services, determining the costs thereof, or designing prices thereof to be charged customers. According to Qwest, the Applicants have neither argued nor demonstrated that the "Lawyers Only" designation will fail to protect their interests adequately.

Covad states that it and other competitor parties rely primarily on their in-house counsel and experts, rather than relying entirely on outside counsel and consultants. Covad adds that these employees have already signed Applicants'

NDA and will abide by its terms, which include a commitment not to use any confidential material for purposes outside of this proceeding. Covad adds:

> The sole issue to be resolved in Applicants' Motion is whether it is reasonable to allow in-house regulatory counsel and internal witnesses, subject to certain restrictions, to have access to documents already provided by Verizon to the FCC and TURN (in this docket). Of importance in Applicants' motion is the recognition that under their interpretation, Qwest and Covad (and perhaps others) in-house counsel, tasked with the presentation of their respective company's case at the state level, *would not* be allowed to review over 7,000 documents already provided to the FCC and to TURN. To put that number into context, Applicants identify that they have turned over approximately 8,100 documents to the FCC; therefore, the 7,000 number represents over 85% of the documents that Covad in-house counsel *would not* be allowed to view. (Covad Response, at 1-2; footnotes omitted; emphasis in original.)

Qwest and Covad note that ALJ Pulsifer resolved the identical question in the SBC-AT&T proceeding, and they add that they will abide by the conditions that Judge Pulsifer adopted in that ruling. Covad adds that attempting to distinguish that ruling on the basis of Applicants' cooperative efforts in discovery and the "last-minute" requests by competitor parties is not persuasive. First, it is in Applicants' interest to cooperate in moving this proceeding along. Second, the fact that the FCC information already is available in a Verizon database means that access can be permitted with minimal burden.

## 4. Discussion

There is no dispute as to whether the categories of information identified as Highly Confidential are sensitive. The dispute involves whether access to this data by competitor parties would give such parties the opportunity to achieve an unfair competitive advantage harmful both to the Applicants and to the general public. At the same time, this question must be weighed in light of the issue

framed by competitors, namely, whether it is a due process violation for Applicants to grant access to confidential data only to certain parties, while denying access to other parties because they are competitors, even if they sign the NDA.

The issue before the Commission is how best to balance due process concerns with Applicants' and the public's interest in preventing the disclosure of competitively sensitive information to Applicants' competitors. The Protective Order adopted in the FCC proceeding provides for different rules governing access compared with those that were adopted in this proceeding. The rules for access to confidential data in this proceeding are within the jurisdiction of this Commission and are not invalidated or modified by rules in other forums, such as the FCC. The fact that different rules have been adopted by the FCC does not automatically justify changing the rules adopted in this proceeding to conform to them.

Like ALJ Pulsifer in the SBC-AT&T proceeding, I conclude that providing access to Highly Confidential data to a company's regulatory counsel and consultants and employees who assist such counsel in case preparation is permissible, provided such individuals sign the Applicants' NDA and that they *do not* engage in any activities for the company relating to developing, planning, marketing, or selling products or services, determining the costs thereof, or designing prices thereof to be charged to customers. Granting access to such individuals subject to the NDA would protect the data from being disclosed or used by competitors for marketing-related purposes while preserving parties' due process rights to examine data relevant to this proceeding.

At the same time, granting parties access to such confidential data, subject to these protections, will preserve parties' ability to complete their case

preparation and to develop a complete record in this proceeding. As pointed out by competitors, the information that they seek is relevant to the issue of whether Verizon's acquisition of control of MCI would adversely affect competition, including the resulting prices that Verizon would be able to charge with the disappearance of MCI as a competitor.

On the other hand, I conclude that Applicants *should* be permitted to withhold access of the designated highly sensitive confidential data from those employees or agents of a competitor that *do* engage in the above-referenced excluded activities for the competitor. Even if an employee of a competing company signs the NDA and does not disclose such highly confidential information to another individual, the employee would still retain knowledge of the confidential information. Even assuming the employee in good faith refrained from disclosing such information to others for competitive advantage, such an employee might still be influenced by competitively sensitive knowledge learned through this proceeding in the course of making competitive business decisions.

Accordingly, it is reasonable to permit Applicants to withhold disclosure of the designated highly competitive materials from such employees or agents that are also engaged in marketing activities for the company even if they sign the NDA. Such an approach is consistent with how the Commission has treated access to confidential data by parties that are competitors in past telecommunications proceedings.[4]

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[4] See, for example, the ALJ Ruling dated November 16, 1995, in R. 93-04-003 / I.93-04-002 entitled "ALJ Ruling Concerning Proposed Protective Order of GTE California Incorporated."

## 5. Adopted Procedures for Access to Highly Confidential Data

In order to balance the Applicants' concerns regarding protection of highly confidential data against parties' due process rights to discovery and development of a complete record, the following procedures are adopted. These procedures apply only to those limited categories of documents identified by the Applicants as Highly Confidential.

Applicants must provide access to Highly Confidential materials sought by the following reviewing representatives of parties that are competitors of the Applicants: regulatory counsel and witnesses (on the condition that they do not engage in activities for the company, as defined below), and permitted regulatory employees of the party, all of whom must sign the Applicants' NDA. Permitted regulatory employees shall be defined as those who have a need to know the information for purposes of case preparation in this proceeding, including any appeals, and who do not engage in developing, planning, marketing or selling products or services, determining the costs thereof, or designing prices thereof to be charged customers.

The fact that Highly Confidential data has already been provided to certain parties (e.g., TURN) indicates that the data is relevant to the proceeding. It is therefore unnecessary for other parties to make a separate showing as to relevance as a condition of gaining access to such data. If an individual representing a competitor that is a party in the proceeding signs the NDA and is not engaged in marketing or related activities for the company, as previously described, Applicants are directed to provide access to such parties' representatives subject to the restrictions in the NDA.

Applicants are permitted to deny access to non-regulatory personnel (including attorneys) who are engaged in developing, marketing or pricing competitive products or services as previously described.

To the extent that prepared testimony or other exhibits prepared for this proceeding may contain such Highly Confidential information, such testimony or other exhibits should be identified with the label "Lawyers Only" and restricted in access.

## 6. Discussion of Confidential Information Among Parties

In order to help expedite the proceeding and limit potential duplicative evidentiary showings, this ruling also directs that parties that have signed the NDA and obtained access to Highly Confidential information may freely discuss among themselves any information claimed by the Joint Applicants to be confidential, including "no copies" documents.

There is no sound basis to prevent individuals representing parties that have gained access to confidential information as a result of signing the NDA from discussing such information among themselves. In order to make the most efficient use of time and to avoid potential duplication in case preparation or testimony, parties should be permitted to enter into discussions and coordinate their efforts accordingly. On the other hand, any confidential information should not be discussed in meetings with individuals that have not otherwise been authorized access to such confidential information under the terms outlined in this ruling.

Accordingly, parties' representatives shall be permitted to discuss among themselves any confidential data already provided to them for use in this proceeding, but shall not be permitted to discuss confidential information with

individuals that have not otherwise been granted access to the confidential information in accordance with this ruling.

**IT IS RULED** that:

1. The rules set forth above are adopted relating to the terms by which access to the Highly Confidential materials of Applicants shall be provided to certain representatives of interested parties that are also competitors of the Applicants.

2. Applicants are directed to promptly respond to outstanding data requests by competitors and other parties with similar outstanding requests in accordance with the directives in this ruling.

3. The joint motion of Verizon Communications Inc. and MCI, Inc., regarding Highly Confidential material is granted in part and denied in part in accordance with this ruling.

Dated July 15, 2005 in San Francisco, California.

/s/ GLEN WALKER
Glen Walker
Administrative Law Judge

## CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties for whom an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Granting, in Part, Motion for Protective Order on all parties of record in this proceeding or their attorneys of record.

Dated July 15, 2005, at San Francisco, California.

/s/ ELIZABETH LEWIS
Elizabeth Lewis

## N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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